Wiramuda (M) Sdn Bhd v Director-General of the Inland Revenue

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-513–10 OF 2020
YAACOB MD SAM, NANTHA BALAN AND NORDIN HASSAN JJCA
7 MARCH 2022

Constitutional Law — Legislation — Validity of impugned legislation — Whether s 4C of Income Tax Act 1967 ('ITA') was constitutional — Whether by subjecting compensation paid for compulsory land acquisition to taxation, s 4C impaired landowner's fundamental right to receive 'adequate compensation' under art 13(2) of Federal Constitution — Whether compulsorily-acquired lands constituted 'stock in trade' so that it came within ambit of s 4C of ITA — Whether dispute over whether or not lands were 'stock in trade' was factual one for Special Commissioners of Income Tax ('SCIT') to determine under s 99(1) ITA appeal process and not for court to resolve in judicial review application — Whether plaintiff had not shown 'special circumstances' entitling it to by-pass the appeal process and apply directly for judicial review to quash notice of assessment to pay tax on the compensation

The respondent had issued a notice of assessment to the appellant requiring it to pay RM52,966,517.27 in tax on compensation the appellant had received from the government for the compulsory acquisition of part of its lands. The tax was charged pursuant to s 4C read with s 24(1)(aa) of the Income Tax Act 1967 ('ITA'). The appellant applied to quash the notice of assessment by way of a judicial review application. Among other things, the appellant contended that s 4C breached art 13(2) of the Federal Constitution ('FC') in that whilst the latter provided for adequate compensation to be paid for the compulsory acquisition of land, s 4C impaired that right by subjecting the compensation to taxation. The High Court dismissed the application holding that: (a) the compulsorily-acquired lands constituted the appellant's 'stock in trade' so that ss 4C and 24(1)(aa) of the ITA applied; (b) the said provisions of the ITA did not contravene the provisions of the FC; and (c) the appellant should have appealed to the Special Commissioners for Income Tax ('SCIT') against the notice of assessment under s 99(1) of the ITA rather than resorting to judicial review given that there were no special circumstances to warrant by-passing the s 99(1) appeal procedure and also because the challenge to the notice of assessment involved questions of facts which the SCIT was best-suited to determine. The instant appeal was against the High Court's decision.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The appellant was not deprived of its right to adequate compensation for the compulsorily-acquired lands. The appellant had exercised its right under s 37 of the Land Acquisition Act 1960 to object to the amount of compensation it was awarded by way of a land reference in the High Court. As such, there was no transgression of constitutional principles or any infringement of the Federal Constitution in the present case as contended by the appellant. Section 4C of the ITA was intra vires the Federal Constitution (see paras 35–36).

(2) The tax imposed on the appellant was in accordance with the law, which was s 4C of the ITA, a federal law enacted by the Legislature. Hence, it was in keeping with art 13(1) and art 96 of the Federal Constitution. The former provided that no person shall be deprived of property save in accordance with law whilst the latter provided that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of Federal law. As such, the taxing in this case could not be said to be ultra vires the Federal Constitution (see paras 28–29).

(3) It was a trite principal of law that where an alternative remedy existed, the remedy by way of judicial review could only be exercised in very exceptional circumstances. Since the appellant's contention was that the compulsorily-acquired lands was not 'stock in trade' under s 4C or s 24(1)(aa) of the ITA, the determination of that issue involved the assessment and determination of material facts and the judge of facts was clearly the SCIT. No special or exceptional circumstance — such as lack of jurisdiction on the part of the respondent, blatant failure to perform a statutory duty or breach of the principle of natural justice by the respondent — was shown to entitle the appellant to by-pass the alternative remedy of the appeal procedure under s 99(1) of the ITA (see paras 38, 43–44 & 49–50).

(4) The appellant contended that the compulsorily-acquired lands were not the appellant's 'stock in trade' and therefore did not come under s 4C of the ITA because, inter alia, it did not hold a developer's licence and had never carried out development work on the lands; that the appellant had remained dormant ever since it stopped quarrying activities on part of the lands in 2011 and that the appellant had never taken any steps to mature the lands for the purpose of enhancing their value. The respondent, on the other hand, submitted that its audit investigation revealed, inter alia, that the appellant was a property developer (based on its memorandum and articles of association and its audited accounts), that the appellant had carried out works to enhance the value of the lands and that the category of the lands was 'building' and there was a plan for a joint venture with the state government to develop a housing project. For all those reasons, the respondent submitted that the lands were the appellant's 'stock in trade' for the purpose of s 4C of the ITA. Since the

issue of whether the lands were 'stock in trade' was a question of fact that needed to be determined via oral and documentary evidence, the judge of facts in this case was the SCIT and not the High Court judge in a judicial review application (see paras 54–57).

[Bahasa Malaysia summary

Responden telah mengeluarkan notis taksiran kepada perayu memohon kepadanya untuk membayar RM52,966,517.27 dalam cukai keatas pampasan yang perayu telah menerima daripada kerajaan untuk pengambilan wajib sebahagian daripada tanah miliknya. Cukai yang dikenakan adalah selaras dengan s 4C dibaca dengan s 24(1)(aa) Akta Cukai Pendapatan 1967 ('ACP'). Perayu memohon untuk membatalkan notis taksiran melalui permohonan semakan kehakiman. Antara yang lain, perayu menyatakan bahawa s 4C bercanggah dengan per 13(2) Perlembagaan Persekutuan ('PP') yang mana dalam FC memperuntukkan agar pampasan mamadai dibayar untuk pengambilan wajib tanah, s 4C menghalang hak tersebut dengan meletakkan pampasan tertakluk kepada cukai. Mahkamah Tinggi mengenepikan permohonan tersebut memutuskan bahawa: (a) tanah yang diambil secara wajib merupakan 'bahagian dalam penjualan' perayu oleh itu, ss 4C dan 24(1)(aa) ITA terpakai; (b) peruntukan ITA tidak bercanggah dengan peruntukan FC; dan (c) perayu sepatutnya merayu kepada Persuruhjaya Khas Cukai ('PKC') terhadap notis taksiran dibawah s 99(1) ITA dan bukannya bergantung kepada semakan kehakiman mengambil kira tiada keadaan khas yang memerlukan pengelakkan s 99(1) prosedur rayuan dan juga kerana cabaran notis taksiran melibatkan persoalan fakta yang mana lebih sesuai untuk ditentukan oleh PKC. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Perayu tidak terjejas haknya untuk menerima pampasan yang memadai untuk tanah yang diambil secara wajib. Perayu telah menggunakan hak mereka dibawah s 37 Akta Pengambilan Tanah 1960 untuk membantah jumlah pampasan yang diawadkan melalui cara rujukan tanah kepada Mahkamah Tinggi. Oleh itu, tiada pelanggaran prinsip perlembagaan atau pelanggaran Perlembagaan Persekutuan dalam kes ini sepertimana yang dinyatakan oleh perayu. Seksyen 4C ACP adalah intra vires Perlembagaan Persekutuan (lihat perenggan 35–36)

(2) Cukai yang dikenakan terhadap perayu adalah selaras dengan undang-undang yang mana, iaitu s 4C ACP, satu undang-undang persekutuan yang digubal oleh legislatif. Oleh itu, selarass dengan per 13(1) dan per 96 Perlembagaan Persekutuan. Perkara 13(1) memperuntukkan bahawa tiada individu boleh disekat hartanya kecuali mana diperuntukan undang-undang manakala per 96 memperuntukkan

bahawa tiada cukai atau kadar boleh dilevi oleh atau untuk tujuan Persekutuan kecuali dengan atau dibawah kuasa undang-undang Persekutuan. Oleh yang demikian, tindakan cukai dalam kes ini tidak boleh dikatakan adalah ultra vires Perlembagaan Persekutuan (lihat perenggan 28–29)

(3) Adalah prinsip mantap bahawa apabila remedi alternatif wujud, remedi melalui semakan kehakiman hanya boleh digunakan dalam keadaan luar biasa. Memandangkan cabaran perayu adalah bahawa tanah yang diambil secara wajib bukanlah 'bahagian dalam penjualan' dibawah s 4C atau s 24(1)(aa) ACP, penentuan isu tersebut melibatkan penentuan dan taksiran fakta material dan hakim fakta adalah PKC. Tiada keadaan khas atau luar biasa — seperti ketiadaan bidangkuasa pada pihak responden, kegagalan jelas untuk menjalankan tanggungjawab statutori atau pelanggaran prinsip keadilan asas oleh responden — telah ditunjukan untuk memberikan hak kepada perayu untuk mengenepikan remedi alternatif prosedur rayuan dibawah s 99(1) ACP (lihat perenggan 38, 43–44 & 49–50)

(4) Perayu menyatakan bahawa tanah yang diambil secara wajib bukanlah 'bahagian dalam penjualan' perayu dan oleh itu, tidak tertakluk dibawah s 4C ACP kerana ianya tidak memegang lesen pemaju dan tidak pernah menjalankan kerja-kerja pemajuan pada tanah tersebut bahawa perayu telah kekal dorman sejak ianya berhenti aktiviti kuari pada sebahagian tanah pada tahun 2011 dan bahawa perayu tidak pernah mengambil apa-apa langkan untuk memajukan tanah untuk meningkatkan nilainya. Responden, sebaliknya, menyatakan bahawa siasatan auditnya menunjukan, antara yang lain, bahawa perayu merupakan pemaju hartanah (berdasarkan memorandum dan artikel perbadanannya dan akaun berauditnya), bahawa perayu telah menjalankan kerja untuk meningkatkan nilai tanah dan bahawa kategori tanah adalah 'bangunan' dan wujud pelan untuk usaha sama dengan kerajaan negeri untuk membangunkan projek perumahan. Untuk semua sebab berikut, responden menghujahkan bahawa tanah tersebut merupakan 'bahagian dalam perniagaan' untuk tujuan s 4C ACP. Sejak isu samada tanah merupakan 'bahagian dalam perniagaan' merupakan satu soalan fakta ianya perlu ditentukan melalui keterangan lisan dan dokumentar, hakim fakta dalam kes ini adalah PKC dan bukannya hakim Mahkamah Tinggi dalam permohonan semakan kehakiman (lihat perenggan 54–57)]

Cases referred to

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)
Berjaya Times Square Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MSTC 30, CA (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] 1 CLJ 451, SC (refd)

Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] 5 MLJ 236; [2019] 7 CLJ 143, CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Ketua Pengarah Hasil Dalam Negeri (LHDN) v IBM Malaysia Sdn Bhd [2021] 2 MLJ 42, CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197, CA (refd)
Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (refd)
Philip Hoalim Jr & Anor v State Commissioner, Penang [1974]2 MLJ 100, FC (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

Legislation referred to

Federal Constitution arts 13, 13(1), 13(2), 96, 121
Finance Act 2014
Income Tax Act 1967 ss 4C, 24(1)(aa), 91(1), (3), 96, 99(1)
Land Acquisition Act 1960 ss 8(1), 10, 16, 22, 37, 38(5), 40(C), 40(D), Forms D, E, H, K

Appeal from: Judicial Review No WA-25-273–06 of 2019 (High Court, Kuala Lumpur)

DP Naban (with S Saravana Kumar, Yap Wen Hui, Fiona Bodipalar and Khor Heng How) (Bodipalar Ponnudurai De Silva) for the appellant.
Ahmad Isyak bin Mohd Hassan (with Mohammad Danial and Hana bt Halim with him) (Inland Revenue Board of Malaysia) for the respondent.

Nordin Hassan JCA:

[1] This is an appeal by Wiramuda (M) Sdn Bhd ('the appellant') against the decision of the High Court Kuala Lumpur on 29 September 2020 in dismissing the appellant's application for judicial review, inter alia, to quash the notice of assessment for year assessment 2018 dated 31 May 2019 issued by the Director-General of the Inland Revenue ('the Revenue').

A THE BACKGROUND FACTS

[2] In 1987, Selangor State Government had alienated to the appellant five Parcels of land ('the land') for development project and the land are as follows:

B (a) HSD 25128, PT25163;

(b) HSD 25129, PT25164;

(c) HSD 25130, PT25165;

C (d) HSD 25131, PT25166; and

(e) HSD 25132, PT25167.

[3] From 1993 until 1994, the appellant had carried out quarry activities on certain parts of the land. Thereafter, from 1996 until 2011 the quarry D activities were continued by a third-party company and the appellant received income from the sale of the quarry rocks. The quarry activities ended in 2011 and the appellant remained dormant since then.

[4] On 1 July 2015, the appellant entered into a sale and purchase E agreement with Mach 8 Sdn Bhd to dispose of the land.

[5] On 23 July 2015, the State Government of Selangor issued a *Gazette* Notification No 2801, a declaration in Form D ('first Form D') under s 8(1) of F the Land Acquisition Act 1960 ('the LAA 1960') to compulsorily acquire Parcels 25163, 25164, 25165, and 25167 for the SUKE Highway project.

[6] Thereafter, on 21 August 2015, a notice of inquiry in Form E was issued to the appellant pursuant to s 10 of the LAA 1960 for Parcel 25167.

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[7] On 26 August 2015, the appellant signed a supplementary sale and purchase agreement with Mach 8 Sdn Bhd to proceed with the land sale which was not affected by the compulsory acquisition under the first Form D.

H **[8]** On 9 December 2016, the State Government of Selangor issued another declaration in Form D ('second Form D') under *Gazette* Notification No 4810 that changed the wide area of Parcels 25163, 25164, and 25165 which were to be acquired. Parcel 25167 was acquired under the first Form D while Parcels 25163, 25164, and 25165 were acquired under the second I Form D. A notice of inquiry in Form E was also issued to the appellant for Parcels 25163, 25164, and 25165.

[9] As regards the acquisition of Parcels 25163, 25164, 25165, and 25167, a notice to offer compensation in Form H was then issued to the appellant

under s 16 of the LAA 1960. However, the appellant contended that the particulars of the parcels in Form H were inconsistent with the particulars of the parcels stated in the first and second Form D.

[10] The appellant also filed an objection about the amount of compensation offered due to the difference of the parcels wide-area stipulated in Form H and first and second Form D, which the appellant contended, would make the appellant suffer loss.

[11] Next, pursuant to s 22 of the LAA 1960, notice in Form K dated 13 September 2019 and 19 September 2017, was issued to the appellant informing about the acquisition of Parcels 25163, 25164, 25165, and 25167. In this regard, the particulars of land in Form H correspond with the particulars in Form K.

[12] Further, on 9 November 2017, the State Government of Selangor had issued a third declaration in Form D ('third Form D') under *Gazette* Notification No 3709 to amend the particulars of Parcels 25163 and 25165 in the second Form D to correspond with the particulars stipulated in Forms H and K.

[13] On 19 December 2017, the state government took physical possession of the parcels in accordance with the third Form D.

[14] On 22 January 2018, Mach 8 Sdn Bhd filed a judicial review application at the High Court Shah Alam against the land administrator and the State Government of Selangor for a declaration that the third Form D is invalid and to be canceled.

[15] The appellant's objection as to the amount of compensation offered for the acquisition of the parcels was also referred to Shah Alam High Court under s 38(5) of the LAA 1960.

[16] On 12 March 2019, the High Court allowed the appellant's application for judicial review, and the third Form D was canceled. It was further ordered that an inquiry be conducted to ascertain the compensation to the appellant for the trespass of the said land by the state government. An appeal was lodged by the land administrator and the State Government of Selangor against the High Court's decision.

[17] Meanwhile, by letter dated 12 February 2019, the Revenue requested the appellant to furnish among others, a complete statement of account for year-end 2014 until 2018, a complete tax calculation for the same period, the

compensation offered for the acquisition of land in Form H, and the amount of compensation received. The appellant by letter dated 21 February 2019 responded to the request and furnished all the related documents including the amount of compensation received concerning the acquisition of the appellant's land.

[18] Thereafter, the Revenue by letter dated 28 February 2019, informed the appellant that the compensation received from the acquisition of the appellant's land was subject to tax under ss 4C and 24(1)(aa) of the Income Tax Act 1967 ('the ITA 1967').

[19] A notice of assessment for year assessment 2018 dated 31 May 2019 for the amount of RM52,966,517.27 was then issued by the Revenue to the appellant. The notice of assessment was the subject matter of the judicial review application before the High Court.

THE DECISION OF HIGH COURT

[20] The learned High Court judge dismissed the appellant's judicial review application on the following grounds:

(a) the Revenue was correct in law to tax the compensation received by the appellant for the acquisition of the appellant's land under ss 4C and 24(1)(aa) of the ITA 1967;

(b) the provisions of ss 4C and 24(1)(aa) of the ITA 1967 are valid law and do not contravene the Federal Constitution;

(c) the appellant's compulsorily acquired land was stock in trade under ss 4C and 24(1)(aa) of the ITA 1967 and as such compensation received is taxable under the said sections; and

(d) the appellant's challenge as to the notice of assessment for year assessment 2018 involves question of facts which is best to be dealt with by the special commissioners of the income tax ('SCIT'). The remedy available under s 99(1) of the ITA for the appellant to appeal against the decision of the Revenue to SCIT in issuing the notice of assessment was not resorted to by the respondent although in the absence of any special circumstances. Thus, the appellant could not bypass the available alternative remedy.

THE APPEAL

[21] The core issues before this court are as follows:

(a) whether s 4C of the ITA 1967 is unconstitutional for contravention of art 13(2) of the Federal Constitution;

(b) whether the appellant in the present case can bypass the alternative remedy of appeal to the SCIT under s 99(1) of the ITA 1967; and

(c) whether the appellant's compulsorily acquired land is stock in trade as envisaged under ss 4C and 24(1)(aa) of the ITA 1967.

THE ANALYSIS AND FINDINGS OF THIS COURT

Whether s 4C of the ITA 1967 is unconstitutional for contravention of art 13(2) of the Federal Constitution

[22] On this issue, counsel for the appellant submitted that s 4C is unconstitutional as it is in contravention with art 13(2) of the Federal Constitution which provides as follows:

> No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[23] In this regard, the appellant contended that s 4C has the effect of removing the fundamental right to adequate compensation afforded under art 13(2) of the Federal Constitution. The Federal Court case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 was quoted to support the appellant's contention where Zainun Ali FCJ said this:

> [197] Article 13(2) is a constitutional safeguard to landowners to receive 'adequate compensation' upon acquisition. Even as the Act authorizes the state to acquire land from landowners, *the law provides that the person deprived of his property must be adequately compensated*. (Emphasis added.)

[24] In determining the issue of the constitutionality of s 4C of the ITA 1967, firstly, we should not lose sight of the principle of law that there is a strong presumption in favour of the constitutionality of provisions in a statute and for the person who challenges the said provision to prove that the provision is unconstitutional. This principle was also emphasised in *Semenyih Jaya*'s case where the court states as follows:

> [93] The preliminary position is that *there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional* (*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701, *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921). The court's function is merely to test the legality of action against principles and standards established by the Constitution. *Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid*. (Emphasis added.)

[25] Reverting to s 4C, this provision was enacted vide the Finance Act 2014 and was passed by Parliament.

Section 4C states:

> 4C *Gain or profits from a business arising from stock in trade parted with by any element of compulsion*
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> For the purpose of paragraph 4(a), *gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including* on requisition or *compulsory acquisition* or in a similar manner. (Emphasis added.)

[26] The related provision which needs mentioning here is s 24(1)(aa) which provides as follows:

> 24 Basis period to which gross income from a business is related
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> (1) Where in the relevant period a debt owing to the relevant person arises in respect of —
>
> (a) ...
>
> (aa) *any stock in trade parted with by any element of compulsion including* on requisition or *compulsory acquisition* or in a similar manner, *in or before the relevant period*. (Emphasis added.)

[27] Here, it is pertinent to examine art 13(2) of the Federal Constitution and its application. For easy reference, art 13(2) is reproduced below:

> *No law shall provide for the compulsory acquisition or use of property without adequate compensation*. (Emphasis added.)

[28] To begin with, the taxation imposed on the appellant for the compensation received from the compulsory acquisition of the appellant's land is in accordance with the law which is s 4C of the ITA 1967. The provision was enacted vide the Finance Act 2014 and passed by Parliament. This conforms with arts 13(1) and 96 of the Federal Constitution which provides:

(a) art 13(1):

> No person shall be deprived of property *save in accordance with law*

(b) art 96:

> No tax or rate shall be levied by or for the purposes of the Federation except *by or under the authority of federal law*. (Emphasis added.)

[29] Hence, as the tax imposed on the compensation of the appellant's compulsorily acquired land was in accordance with s 4C, a federal law enacted by the Legislature, the taxing could not be said to be ultra vires the Constitution.

[30] In the Federal Court case of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, Gill FJ explained as follows: A

> ... Taxation is an independent power of the State. *The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers*, destroying or otherwise depriving of a man of his property, *the latter is precluded from questioning its reasonableness by invoking art 13(1) of the Constitution*, however arbitrary the law might palpably be. There is indeed nothing arbitrary about imposing income tax for purpose of raising revenue. It is contended for the appellant that he does not complain about taxation but about the method of recovery of such tax. *So long as the method of recovery is laid down by the law, I do not see how it can be challenged*. (Emphasis added.) B C

[31] In an earlier Federal Court case of *Philip Hoalim Jr & Anor v State Commissioner, Penang* [1974]2 MLJ 100, Ali FJ has this to say:

> Likewise I must say that *no question as to the effect of art 13(1) of the Constitution has arisen for the consideration of this court. The said Article does not restrict legislative powers but merely declares unconstitutional or prohibits any illegal executive acts of depriving property*. See commentary on this provision by Sheridan and Groves in '*The Constitution of Malaysia*' on p 44. The four orders named in the second question, particularly Pg PU39/69, does not have the effect of depriving any person of his property. Pg PU 39/69, for instance, does no more than what is permitted to be done by s 102(1) of the Code. *If the applicant's right is affected by any of the said orders it is because Parliament has provided that it can be so affected. Article 13(1) of the Constitution does not restric tthe legislative powers of the Parliament*. (Emphasis added.) D E F

[32] Likewise art 13(2) of the Federal Constitution, it does not restrict the legislative powers of Parliament but merely requires adequate compensation to be awarded for compulsory acquisition of land. In *Semenyih Jaya*'s case, the court held as follows: G

> [27] The right to acquire, hold and enjoy property is a fundamental right guaranteed by the Federal Constitution. However, it is not an absolute right since ownership of property is subject to what is provided for in the Federal Constitution. One's property can be acquired by the state. *However, that acquisition would have to be carried out in accordance with the law. The Federal Constitution also safeguards the land owner's right to receive adequate compensation as a result of his land being acquired. Article 13(2) specifically makes provisions for payment of adequate compensation for the property acquired*. (Emphasis added.) H

[33] The Federal Court in *Semenyih Jaya*'s case emphasised the need for payment of adequate compensation for property compulsorily acquired as required by art 13(2). However, the main decision, in that case, is that the ultimate decision in determining the adequacy of the compensation is with the judge and not the assessor. As such s 40(D) of the LAA 1960, which placed the power to decide the adequacy of the compensation with the assessor was I

declared unconstitutional as it usurped the judicial powers of the judge in contravention of art 121 of the Constitution. Further, the non-compliance of s 40(C) of the LAA 1960 which requires the opinion of each assessor on the various head of compensation shall be given in writing and shall be recorded by the judge, violating the statutory safeguards to determine the amount of compensation awarded.

[34] The Federal Court in the same case, explained the principle of equivalence in determining the issue of adequate compensation in the following words:

> [198] But what is adequate compensation for a person who has been deprived of his or her property? *The term 'adequate compensation' is not defined in the Act*. In *Pentadbir Tanah Daerah Gombak lwn Huat Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ 282, the Supreme Court held that '*the basic principle governing compensation is that the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired*' (see *Compulsory Acquisition and Compensation* by Sir Frederick Corfield QC and RJA Carnwath).
>
> [199] *The above principle is known as the principle of equivalence*. By this principle, the affected landowners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land. (Emphasis added)

[35] Reverting to the present case, the appellant was not deprived of his right to adequate compensation for the land compulsorily acquired by the State Government of Selangor. By s 37 of the LAA 1960, the appellant has the right to object to the amount of compensation awarded by way of land reference to the High Court. In fact, in the present case, the appellant's complaint on the inadequacy of compensation had been referred to Shah Alam High Court for determination.

[36] In the circumstances, we find there is no transgression of constitutional principles or any infringement of the Constitution in the present case as contended by the appellant. Thus, it is our considered view that s 4C of the ITA 1967 is intra vires the Federal Constitution.

Whether the appellant in the present case can bypass the alternative remedy of appeal to the SCIT under s 99(1) of the ITA 1967

[37] In determining the issue, it is instructive to make reference to s 99(1) of the ITA which provides:

> 99 Right of appeal
>
> (1) Subject to subsection (1A), *a person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners* against the assessment by giving to the

Director-General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form. (Emphasis added.)

[38] It is a trite principle of law that where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances cases. There is a plethora of cases on this issue and to begin with, is the Supreme Court case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 451 where it was held as follows:

A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the Court but where there are other avenues or remedies open to the applicant it will only be exercised in very exceptional circumstances*.

In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

In answer to the first question we would therefore hold that the discretion is still with the courts but w*here there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice*. (Emphasis added.)

[39] Hashim Yeop Sani SCJ, in *Jagdis Singh*, succinctly explained that certiorari should not normally be issued except, if it can be shown the existence of clear lack of jurisdiction, failure to perform a statutory duty, or serious breach of principles of natural justice. A case may be considered as an exceptional case with the presence of one of the elements mentioned above.

[40] Further, in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563, Suriyadi FCJ emphasised the importance for the applicant to refer the matter to SCIT to establish their case in the following words:

[60] *Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers, or documents which is in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners, the respondents will*

have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined (see *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203).

[61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied party may appeal only up to the Court of Appeal (*Tio Chee Hing v United Overseas Bank (M) Bhd* [2013] 3 MLJ 212; [2013] 2 CLJ 910; *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy* [2011] 2 MLJ 433; [2011] 3 CLJ 241; *Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 08–31 of 1999(S)) (unreported)).

[62] *By filing an appeal before the Special Commissioners the respondents would have had that opportunity to challenge the decision of the appellant* as to whether the payments were indeed royalty ... (Emphasis added.)

[41] Next, in *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457, the second question posed to the court was 'whether the existence of a statutory appeal procedure/alternative remedy a bar to judicial review or declaratory reliefs?' and the Federal Court answered it as follows:

[25] In the final analysis, *in the absence of exceptional or appropriate circumstances*, the answer to the second question is in the affirmative. (Emphasis added.)

[42] This court in a recent case of *Ketua Pengarah Hasil Dalam Negeri v IBM Malaysia Sdn Bhd* [2021] 2 MLJ 42, in which its decision had been affirmed by the Federal Court, echoed the same principle of law as follows:

[57] Section 99 of the ITA expressly provides the right of appeal by filing a written notice of appeal within 30 days after service of the notice of assessment.

[58] *It is established law that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases*. In *Government of Malaysia & Anor v Jagdish Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 , the Federal Court held: A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review.

Judicial review is always at the discretion of the court but where there are other avenues or remedies open to the applicant it will only be exercised in very exceptional circumstances. In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

[59] In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197 (CA), it was held:

> (3) *The respondent failed to show any special or exceptional circumstances for judicial review. It was not justified in choosing the court as a forum to ventilate its grievance when there was in existence the specific remedy of appeal before the Special Commissioners of Income Tax ('SCIT')* under s 109H (1) of the ITA.
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> [60] The main grievance of the respondent against the advance ruling is the treatment of the distribution fee payable by the respondent to a non-resident as royalty. It is a matter of interpretation of the law, which is not a special circumstance to allow a judicial review application. (Emphasis added.)

[43] In the present case, the appellant is challenging the notice of assessment for year assessment 2018 issued by the Revenue. The appellant contended that the appellant's land compulsorily acquired by the Selangor State Government is not stock in trade under ss 4C or 24(1)(aa) of the ITA 1967. As such it was argued by the appellant that tax should not be imposed on them pursuant to the said sections.

[44] In our view, the appellant's contention involves assessment and determination of material facts and the judge of facts is clearly the SCIT.

[45] On the same issue, in *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197, this court reiterated the fact that SCIT is the judge of facts in the following words:

> [31] *It is to be emphasised that the dispute raised by the respondent could be dealt with by the Special Commissioners of Income Tax like any other appeals on assessment. The merits of this application significantly involve disputes of facts and being as such, it is our opinion that the Special Commissioners of Income Tax being judges of fact is the best for hearing and deciding on tax grievance*s. The position of the Special Commissioners of Income Tax as judges of fact has been confirmed by the Federal Court in *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 when it authoritatively said:
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> > *We say so because the Special Commissioners are the judges of fact*, and have the jurisdiction to consider not only the plea of limitation based on sub-ss 1 and 3 of s 91 of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery of tax by suit is prohibited by s 106(3) of the Act from entertaining. (Emphasis added.)

[46] Further, in *Berjaya Times Square Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MSTC 30–454 it was also held that merits of assessment by the Revenue is best reserved for the SCIT and states this:

> 39. *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563, is one of the leading authorities for the legal proposition

A that Judicial Review is a court proceeding to challenge the legality of the decision-making process by a public authority. Further, the Court sitting in a JR application is exercising its supervisory jurisdiction and is not to examine the merits of the application. Before the Federal Court decision in *Alcatel-Lucent*'s case, the Court of Appeal in *Tan Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Another* [2009] 1 MLJ 555 also decided consistent with the legal *proposition that* the court exercises its supervisory jurisdiction when hearing a Judicial Review application. *To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as a case stated to the High Court.* (Emphasis added.)

[47] In *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236; [2019] 7 CLJ 143, this court had affirmed the decision of the High Court in dismissing the appellant's application for judicial review for failing to exhaust the domestic appeal under s 99(1) in absence of any special circumstances. The facts, in that case, are almost similar to the facts in the present case where the appellant's application for judicial review to quash the notice of assessment of the Revenue that imposed a tax on compensation for the appellant's compulsorily acquired land.

[48] On this issue, counsel for the appellant submitted that there exist exceptional circumstances in the present case. The reason is that s 4C contravenes art 13 of the Federal Constitution and is liable to be struck down by this court. Therefore, there is a clear lack of jurisdiction on part of the Revenue to invoke s 4C and imposed the tax on the appellant.

[49] In this regard, we find the appellant's contention is bereft of any merit as we have decided earlier that s 4C does not contravene the Federal Constitution. There is no special or exceptional circumstance that entitled the appellant to bypass the alternative remedy of the domestic appeal process under s 99(1) of the ITA 1967. The assessment for year assessment 2018 on the appellant was made by the Revenue pursuant to its statutory powers under sub-s 91(1), 91(3), and s 96 of the ITA 1967, apart from s 4C of the same Act. For ease of reference, the relevant provisions are as follows:

(a) Section 91 (1)

The Director-General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration makes an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(b) Section 91(3)
(3) The Director-General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent, in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default, or negligence in question.

(c) Section 96(1)
(1) As soon as may be after an assessment, other than an assessment under subsections 90(1) and 91A(1), has been made, the Director-General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made.

[50] In this regard, we find, the appellant has not established the existence of lack of jurisdiction on part of the revenue, blatant failure to perform a statutory duty, or breach of the principle of natural justice by the Revenue.

[51] On this ground alone, the decision of the High Court judge in dismissing the judicial review application by the appellant is correct in law.

[52] At this juncture, it is apposite to highlight the pertinent statement by Gill FJ in *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 which states:

> In place of a Board of Review, we now have the Special Commissioners of Income Tax. It is open to go before them and prove that he is not liable to assessment. *The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of the remedy as laid down by the law he has a right to come to courts*. (Emphasis added.)

[53] Be that as it may, we will now proceed to deal with the final issue

Whether the appellant's compulsorily acquired land is stock in trade as envisaged under ss 4C and 24(1)(aa) of the ITA 1967

[54] The appellant contended that the appellant's compulsorily acquired land was not the appellant's stock in trade and therefore, is not subject to tax under s 4C. The reasons to support this contention are as follows:

A (a) the appellant did not hold a developer's license and has never carried out development work on the land;

(b) when the quarry activity ended in 2011, the appellant has remained dormant;

B (c) the land has been classified as the appellant's non-current asset since 2011;

(d) the land has been held by the appellant for 25 years before being compulsorily acquired by the state government; and

C (e) the appellant has never taken any steps to mature the land for the purpose of enhancing its value.

[55] Conversely, the Revenue submitted that based on its audit investigation the material facts discovered are as follows:

D (a) the appellant's memorandum and article of association and its audited account showed that the appellant is a property developer;

(b) the appellant had carried out works that increased the value of the land based on the expenditure for the said purpose as stated in the audited E account;

(c) the land title shows that the category of the land is building and that the land is for the joint venture with state government in a housing project; and

F (d) the appellant had entered into a sale and purchase agreement with Mach 8 Sdn Bhd to dispose of the land before the acquisition and additional sale and purchase agreement for the sale of the balance of the appellant's land which was not compulsorily acquired by the state government.

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[56] As such, the Revenue submitted that the appellant's acquired land was stock in trade of the appellant for the purpose of s 4C of the ITA 1967.

H **[57]** Here, we find that the issue of stock in trade is a question of fact that needs to be determined by a judge of facts. This includes assessing evidence by witnesses and documents presented and the judge of facts is the SCIT not the High Court judge in a judicial review application.

I **[58]** The appellant's reliance on the case of *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 on this issue is untenable as the appellant, in that case, had proceeded with an appeal to the SCIT under s 99(1) of the ITA 1967 and thereafter, by way of case stated, the case was brought to the High Court.

CONCLUSION

[59] Based on the reasons aforesaid, it is our unanimous decision that the appellant's appeal is hereby dismissed with costs of RM20,000. The decision of the High Court is affirmed. Costs is subject to payment of allocator fee.

Appeal dismissed with costs; High Court's decision affirmed.

Reported by Ashok Kumar